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No. 585

In the Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	7
Summary of argument	7
Argument:	
1. Private rights in the beds of navigable rivers are subject to the navigation servitude created in favor of the Federal Government by the Constitution	10
2. The Federal Government's navigation servitude extends to all lands below the high-water mark of a navigable river	13
3. Structures placed on, over, or under lands impressed with a navigation servitude must "suffer the consequences of the improvement of navigation"	14
4. Even a licensed structure in the bed of a navigable river must "suffer the consequences" of subsequent improvements	22
Conclusion	24
Appendix A	25
Appendix B	27

CITATIONS

Cases:	
Barr v. *Spalding*, 46 F. 2d 798	13
Bedford v. *United States*, 192 U. S. 217	22
Brown v. *United States*, 81 Fed. 55	14
Chicago, B. & Q. Railway v. *Drainage Comm'rs*, 200 U. S. 561	21
Cubbins v. *Mississippi River Com.*, 241 U. S. 351	16
Delaware R. Co. v. *Weeks*, 293 Fed. 114	14
Gibson v. *United States*, 166 U. S. 269	7, 11, 16
Gilman v. *Philadelphia*, 3 Wall. 713	7, 10
Great Northern Ry. Co. v. *Washington Elec. Co.*, 197 Wash. 627, 86 P. 2d 208	17
Greenleaf Lumber Co. v. *Garrison*, 237 U. S. 251	7, 9, 11, 13, 19, 20, 22, 23
Hawkins Point Light-House Case, 39 Fed. 77	12
Heyward v. *United States*, 46 C. Cls. 484, 52 C. Cls. 87	20
Hood v. *United States*, 49 C. Cls. 669	8, 16, 17
Jackson v. *United States*, 230 U. S. 1	16

Cases—Continued. Page

Jenkins v. *United States*, 60 C. Cls. 23, affirmed 273 U. S. 649 ..... 13, 19
Lewis Blue Point Oyster Co. v. *Briggs*, 229 U. S. 82 .. 8, 10, 14, 15
Louisville Bridge Co. v. *United States*, 242 U. S. 409 23
Manigault v. *Springs*, 199 U. S. 473 ..... 21, 22
Marret v. *United States*, 82 C. Cls. 1, certiorari denied, 299 U. S. 545 ..... 13, 18, 20
Mills v. *United States*, 46 Fed. 738 ..... 20, 21
Morrill v. *St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 2 N. W. 842 11
New Jersey v. *Sargent*, 269 U. S. 328 11
Philadelphia Co. v. *Stimson*, 223 U. S. 605 ..... 11, 19, 23
Port of Seattle v. *Oregon & W. R. R.*, 255 U. S. 56 11
Richardson v. *United States*, 100 Fed. 714 14
Scranton v. *Wheeler*, 57 Fed. 803 12
Scranton v. *Wheeler*, 179 U. S. 141 ..... 8, 10, 11, 12, 13
South Carolina v. *Georgia*, 93 U. S. 4 ..... 12, 16
Stockton v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 12
Union Bridge Co. v. *United States*, 204 U. S. 364 ..... 9, 16, 23
United States v. *Appalachian Electric Power Co.*, No. 12, October Term, 1940 ..... 10, 12, 18, 22
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53 .... 8, 10, 11, 12, 14, 15, 19
United States v. *Cress*, 243 U. S. 316 ..... 8, 17, 18
United States v. *Dern*, 289 U. S. 352 13
United States v. *Heyward*, 250 U. S. 633 20
United States v. *Lynah*, 188 U. S. 445 .. 8, 14, 17, 18, 19, 20, 21, 22
United States v. *Meyer*, 113 F. 2d 387, certiorari denied November 25, 1940 ..... 13, 20
United States v. *Rio Grande Irrigation Co.*, 174 U. S. 690 .. 22
W. A. Ross Const. Co. v. *Yearsley*, 103 F. 2d 589, affirmed on another point 309 U. S. 18 ..... 13, 14
West Chicago Railroad v. *Chicago*, 201 U. S. 506 16
Whitaker v. *McBride*, 197 U. S. 510 ..... 10, 11
Willink v. *United States*, 240 U. S. 572 ..... 7, 8, 13, 20, 22

Constitution and statutes:

Rivers and Harbors Act of March 3, 1899, c. 425, secs. 9 and 10, 30 Stat. 1151, 33 U. S. C. sec. 401 ..... 2, 4, 9, 22, 23
Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 918 .. 2
Judicial Code, sec. 240 (a), as amended by the Act of February 13, 1925 2
U. S. Const. Amendment V 8, 12, 22

Miscellaneous:

16 Op. A. G. 479 (1880) 14
16 Op. A. G. 534 (1880) 13
17 Op. A. G. 109 (1881) 10, 13
18 Op. A. G. 64 (1884) 14

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 535

UNITED STATES OF AMERICA, PETITIONER

v.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 188–198) is reported in 113 F. 2d 919. The district court did not write an opinion.

JURISDICTION

The judgments of the circuit court of appeals were entered on July 30, 1940 (R. 198–199). The petition for a writ of certiorari was filed on October 29, 1940, and was granted on December 9, 1940.

The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States, when it raises the water in a navigable stream above the ordinary high-water mark for the improvement of navigation, is required to compensate the riparian owner for the additional flooding of structures located in the bed of the river.

STATUTE INVOLVED

Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, c. 425, 30 Stat. 1151, 33 U. S. C. secs. 401, 403, are printed as Appendix A.

STATEMENT

During the past thirty years Congress has appropriated large sums of money for the construction of a series of locks and dams in the upper Mississippi River. These dams, now 26 in number, raise the level of the river by creating slackwater pools which are so spaced as to provide a nine-foot channel from Minneapolis to the mouth of the Missouri River (R. 112–113). Lock and Dam No. 5, near Minneiska, Minnesota, was authorized by the Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 918, 927, and is an integral part of the Government's program for improving the navigability of the upper Mississippi River.

This dam raises the level of the river at Minneiska some six or eight feet above ordinary high-water mark (R. 132, 133, 140), creating a lake or pool which extends upstream for a distance of more than seven miles and inundates the bottom lands along the west bank of the river in Wabasha and Winona counties, Minnesota (R. 156, 179).

Inasmuch as the tracks of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the telegraph lines of the Western Union Telegraph and Cable Company are located on an embankment which follows the westerly bank of the Mississippi River across these bottom lands in Wabasha and Winona counties, it was necessary for the Government in 1933, before the dam was completed, to institute the present condemnation proceedings to acquire the right to back water across the companies' right-of-way and up against their embankment to an elevation of 660 feet above mean sea level (R. 1–7, 8–14, 15, 16). Orders granting condemnation and appointing commissioners to ascertain and report the compensation to be paid the respondents were entered on April 13, 1934 (R. 17–20, 20–23). Work on the dam having progressed more rapidly than the litigation, the court on August 4, 1934, entered orders granting the United States immediate possession (R. 23–24, 25–26). The Government then proceeded to remove the timber and underbrush in the margins of the river and in the area to be flooded,

so as to prevent any subsequent clogging of the locks and spillways (R. 98, 107). The railroad embankment was thereby exposed to greater wind, wave, and ice action, which made it necessary for the defendants to riprap and otherwise protect their embankment (R. 116).

When the question of valuation was submitted to a jury in 1935, the Government offered to prove that the railroad company, in realigning and doubletracking its roadbed in 1910,[1] had eliminated a number of curves by placing portions of their embankment across the bends in the Mississippi River with the result that four segments of the present embankment (for a total distance of 5,300 feet) encroach upon the bed of the river.[2] This proof was offered on the theory that private rights in the beds of navigable streams are subordinate to the navigation servitude held by the

[1] Before realigning its roadbed in 1910, the railroad company obtained the local army engineer's consent (R. 147–151), but the company did not submit its plans to the Chief of Engineers and the Secretary of War, as required by the Act of March 3, 1899, c. 425, secs. 9 and 10, 30 Stat. 1151.

[2] Respondents have conceded that one segment (1,200 feet) of the embankment rests on lands which were in 1910, and are now, below the ordinary high-water mark of the Mississippi River (R. 123). Whether the other three segments are within the bed of the river is a jury question (R. 191).

It is to be noted that the Government's offer of proof, contrary to respondents' contention (Br. in Opp. 12–13, 31), did not relate solely to the shore line of 1910. The offer is in the present tense, namely, that four segments of the railroad embankment "*are* constructed on land which *is* located below ordinary high-water mark" (R. 146).

Federal Government and that the defendants were therefore not entitled to compensation for the additional flooding of those four segments of their right-of-way and embankment which are located, between high- and low-water mark, in the bed of the stream (R. 146; see R. 127–129, 130–139, 140–147). Diagrams illustrative of the physical facts involved in the Government's offer of proof are printed as Appendix B, *infra*, p. 27.[3]

The defendants objected to this evidence as immaterial (R. 130). They argued that structures located in the bed of the stream had to be compensated for in those cases where the damages complained of were caused by raising the level of the river over and above the ordinary high-water mark, and where the structures themselves were not an obstruction or menace to navigation. The trial judge adopted this theory and rejected the Government's offer of proof (R. 147). The United States then moved to dismiss from the proceedings the four areas specified in its offer of proof, but this motion was also denied (R. 152–155).[4] A subsequent verdict assessing the

[3] Respondent objects to the inaccuracy of this illustrative diagram (Br. in Opp. 4–5), but we do not offer it as proof of the facts. Whether or not respondent's diagrams (Br. in Opp. 35–38) are accurate cannot be determined until after trial on the issue of encroachment.

[4] In the condemnation petitions the Government expressly declared that the inclusion of property below high-water mark was not to be deemed an admission that defendant's title was superior to the public servitude (R. 4, 11).

entire damages to the encroachment and non-encroachment portions of the embankment at $177,594.68 (R. 41) was approved by the court (R. 45–49). Both sides took an appeal (R. 49–60, 87).

As a result of subsequent decisions in other cases, many issues raised by the appeals were settled, and the parties accordingly entered into a stipulation in 1938 limiting the issues on appeal to the denial of the Government's offer of proof and motion to dismiss. It was also agreed that the judgment should be subdivided, that $67,604.88 should be deemed the fair and reasonable cost of adjusting the structures in the four so-called "encroachment areas", and that the appeals from the rest of the judgment covering the admittedly non-encroachment areas should be dismissed (R. 118–125). The circuit court of appeals, pursuant to this stipulation, modified the lower court's judgment and dismissed the appeals and cross-appeals except as to the encroachment areas (R. 80–83, 84–87).

The questions thus reserved were thereafter briefed and argued, and the rulings of the district court on these questions were affirmed. The appellate court held that the additional flooding of respondents' property was a compensable taking even though the damaged structures were located in the bed of the stream (R. 188–198).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that the United States, when it raises the water in a navigable stream above the ordinary high-water mark for the improvement of navigation, is required to compensate the riparian owner for the additional flooding of structures located in the bed of the river.

2. In not directing the district court to dismiss, from the condemnation proceedings, that segment of the railroad embankment which is admittedly within the bed of the Mississippi River (R. 123).

3. In not remanding the case to the district court with directions to determine whether the other three segments are located on land impressed with a navigation servitude.

SUMMARY OF ARGUMENT

The navigable rivers of the United States are "the public property of the nation." *Gilman* v. *Philadelphia,* 3 Wall. 713, 724–725. Private rights in the beds of such streams are "always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." *Gibson* v. *United States,* 166 U. S. 269, 272. This servitude extends to the whole expanse of the stream, including lands between ordinary high- and low-water mark. *Willink* v. *United States,* 240 U. S. 572, 580; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 263.

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When the Government, in the exercise of its commerce power, interferes with a riparian owner's use of land impressed with a navigation servitude, the "taking" or "injury" is not compensable under the Fifth Amendment. *Scranton* v. *Wheeler*, 179 U. S. 141, 163. Persons who place structures on land subject to a navigation servitude must "suffer the consequences of the improvement of navigation." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70; *Hood* v. *United States*, 49 C. Cls. 669, 678–680 (1914). And this is true even though the use which the riparian owner makes of the river bed does not in and of itself impede navigation. *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 86–88.

United States v. *Cress*, 243 U. S. 316, and *United States* v. *Lynah*, 188 U. S. 445, require no contrary conclusion. The first case is not in point because it involved land impressed with no navigation servitude. The second case, insofar as it holds that lands between high- and low-water mark are not subject to a navigation servitude and that the "taking" of such lands for navigation purposes is compensable, is no longer good law. *Willink* v. *United States*, 240 U. S. 572, 580; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. Furthermore, even under the doctrine of the *Lynah* case, the injuries now complained of are consequential in character and do not constitute a "taking" compensable under the Fifth Amendment.

The fact that respondents, prior to the realignment of their roadbed in 1910, obtained the local army engineer's consent (R. 147–151), does not prevent the Government, under any principle of contract or estoppel, from making subsequent navigation improvements. In the first place, respondents did not submit their plans to the Chief of Engineers and the Secretary of War, as required by the Rivers and Harbors Act of March 3, 1899, c. 425, secs. 9 and 10, 30 Stat. 1151. In the second place, even a properly licensed structure erected on land impressed with a navigation servitude, must "suffer the consequences" of subsequent navigation improvements. *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 260; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 373, 388–389, 399–400.

ARGUMENT

Respondents' embankments, it must be assumed here, are located in the bed, that is, below the ordinary high-water mark, of a navigable stream. Their property rights, therefore, are held subject to the overriding power of the United States to improve navigation. This servitude extends to navigation improvements which change the natural condition of the stream, else it would be meaningless. And it exists equally in the case of land and structures which in themselves offer no obstacle to navigation. Otherwise the federal navigation powers would be limited to the removal of obstructions, and the equally important power to

make general navigation improvements might often be defeated by the cost of paying compensation for property interests which by definition exist only in servitude to the navigation powers of the United States.

These principles, which are decisive of the case at bar, have been settled by numerous decisions of this Court. The following argument, therefore, is presented in summary fashion.

1. *Private rights in the beds of navigable rivers are subject to the navigation servitude created in favor of the Federal Government by the Constitution.*—The navigable rivers of the United States are "the public property of the nation," and any private rights in these streams are subservient to the dominant power of Congress to improve navigation. *Gilman* v. *Philadelphia*, 3 Wall. 713, 724–725; *United States* v. *Appalachian Electric Power Co.*, No. 12, October Term 1940, p. 6; 17 Op. A. G. 109, 110 (1881); *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62, 70; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 87–88; *Scranton* v. *Wheeler*, 179 U. S. 141, 163.

Although under local law the technical title to the bed of the stream may be vested in the riparian proprietor,[5] such title "is always subject to the

[5] Each state decides for itself whether a riparian proprietor's title to lands along a navigable river stops at the high-water mark, extends to the low-water mark, or continues to the thread of the stream. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 60; *Whitaker* v. *McBride*, 197 U. S. 510,

servitude in respect to navigation created in favor of the Federal government by the Constitution." *Gibson* v. *United States*, 166 U. S. 269, 272; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 635; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 259; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62–63. And this is true whether the title be in the state or the riparian proprietor. *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *New Jersey* v. *Sargent*, 269 U. S. 328, 337. Hence, respondents' argument (Br. in Opp. 14–16) that the Minnesota law accords them certain rights in the beds of navigable rivers is irrelevant. It may be conceded that respondents are riparian owners (R. 145), and that they have "as complete a right to the use of the riparian lands, the water, and river bed as can be obtained under state law," but the conclusion is still inescapable that the state and the respondents, alike, "hold the waters and lands under them subject to the power of Congress to control the waters for the purpose of commerce."

511–512. In some states, e. g., Washington, a riparian proprietor has no rights below the high-water mark, the state having reserved to itself title to the beds of all navigable streams. *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 64. In other states, e. g., Nebraska, the riparian proprietor holds to the thread of the stream, the state having retained no title whatever. *Whitaker* v. *McBride*, 197 U. S. 510, 511. In still other states, e. g., Minnesota, private titles extend to the low-water mark, with title to the rest of the bed in the state. *Morrill* v. *St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 226, 228, 2 N. W. 842 (1879).

United States v. *Appalachian Electric Power Co.*, No. 12, October Term 1940, p. 20. The technical title may be helpful in protecting respondents against acts of the state or third parties, but it is of no avail against the exercise by the Federal Government of its navigation servitude. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62.

The subordination of private rights in the beds of navigable streams to the Government's navigation powers is made abundantly clear by the decisions of this Court. For example, when the United States, in order to improve navigation, appropriates a portion of the bed of a navigable stream for a pier, a lighthouse, a breakwater, or a dam, the private owner is completely ousted. But such a "taking" is not compensable under the Fifth Amendment, because the United States is merely exercising a servitude to which the land was already subject. *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *South Carolina* v. *Georgia*, 93 U. S. 4, 11, 12; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62, 72; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J.), referred to with approval in *Scranton* v. *Wheeler, supra*, pp. 159–161; *Hawkins Point Light-House Case*, 39 Fed. 77, 83 (C. C. Md.), referred to with approval in *United States* v. *Chandler-Dunbar Co., supra; Scranton* v. *Wheeler*, 57 Fed. 803, 815 (C. C. A. 6), reversed upon joint motion of the parties, 163 U. S. 703, but quoted at length in 179 U. S. 141, 144–146.

2. *The Federal Government's navigation servitude extends to all lands below the high-water mark of a navigable river.*—The entire bed of the stream, including lands between ordinary high- and low-water mark, is subject to the Federal Government's navigation servitude. *Willink* v. *United States,* 240 U. S. 572, 580; *United States* v. *Dern,* 289 U. S. 352, 354; *Marret* v. *United States,* 82 C. Cls. 1, 13 (1936), certiorari denied, 299 U. S. 545; 16 Op. A. G. 534 (1880); 17 Op. A. G. 109 (1881). "Whatever rights the owner possesses below ordinary highwater mark are subordinate to the rights of the public." *United States* v. *Meyer,* 113 F. 2d 387, 398 (C. C. A. 7), certiorari denied, November 25, 1940. The navigation servitude of the Federal Government "extends, not only to that portion of the soil continuously submerged by the stream in its natural state, but also to that portion of the soil above low-water mark, and below the ordinary and usual high-water mark." *Barr* v. *Spalding,* 46 F. 2d 798, 800 (W. D. Ky.). "When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent on the depth or shallowness of the water." *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 263; *Scranton* v. *Wheeler,* 179 U. S. 141, 143, 144; *W. A. Ross Const. Co.* v. *Yearsley,* 103 F. 2d 589, 593 (C. C. A. 8), affirmed on another point, 309 U. S. 18; *Jenkins* v. *United States,* 60 C. Cls. 23, 28–29 (1925),

affirmed 273 U. S. 649; *Delaware R. Co.* v. *Weeks*, 293 Fed. 114, 120 (Del.); 16 Op. A. G. 479 (1880); 18 Op. A. G. 64 (1884).

3. *Structures placed on, over, or under lands impressed with a navigation servitude must "suffer the consequences of the improvement of navigation."*—It naturally follows from the foregoing principles that persons who place piers, wharves, docks, and other structures "in the shallow water of the shore" on land subject to a navigation servitude do so with the realization that "every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70; *W. A. Ross Const. Co.* v. *Yearsley*, 103 F. 2d 589, 592 (C. C. A. 9), affirmed on another point, 309 U. S. 18.

This is true even though the use which the riparian owner makes of the river bed does not in and of itself impede navigation. *Lewis Blue-Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 86–88. In that case this Court rejected the doctrine laid down in two lower court decisions[6] that so long as the owner of the bed of a navigable body of water "did not use it 'for the erection of structures impeding or obstructing navigation,' his ownership of the

[6] *Brown* v. *United States*, 81 Fed. 55 (C. C. E. D. Va.); *Richardson* v. *United States*, 100 Fed. 714 (C. C. E. D. Va.). The claimant also relied upon *United States* v. *Lynah*, 188 U. S. 445, 471, but to no avail (p. 83).

bottom and his right to put it to such use as did not obstruct navigation, was a property right, which could not be destroyed or taken without compensation."[7] Such a doctrine, this Court said (p. 87), fails to "recognize the qualified nature of the title which a private owner may have in lands underlying navigable waters."

Since a person who places structures in the bed of a navigable river must "suffer the consequences of the improvement of navigation," he cannot justly complain if the Government elects to change the natural depth or flow of the river. To say that a servitude exists for the "improvement of navigation," and then to say that the servitude ceases to exist the moment improvements are undertaken would be absurd. That the servitude continues even though the "natural condition" of the stream has been artificially changed is illustrated by a number of cases decided by this Court:

For example, in *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, the United States dredged a channel across shallow waters where no channel had previously existed, thus destroying valuable oyster beds belonging to the claimant. The latter contended (p. 84) that, inasmuch as the Government had thus made "a place for vessels of deep draft where nature made a place for skiffs," he was entitled to compensation for the damages resulting from these artificial improvements. But

[7] A similar contention was rejected in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 61, 70.

since the private owner's rights in these shallow water were subject (p. 88) "to the power of Congress to deepen the water over such lands," he had to "suffer the consequences" not only of the dredging operations but also (p. 85) of the dumping operations which destroyed oyster beds on each side of the dredged channel. In *West Chicago Railroad* v. *Chicago*, 201 U. S. 506, a railway tunnel which had been previously constructed under the Chicago River was ordered removed so that the channel could be dredged to a depth of 21 feet. This Court held that the railroad was not entitled to compensation. In *Union Bridge Co.* v. *United States*, 204 U. S. 364, 373, 388–389, 399–400, the Government, after placing a dam across the Ohio River and raising "the water in the Allegheny and Monongahela at their junction six feet above their normal depths," ordered the bridge which spanned the Allegheny River at that point to be altered or removed so that it would not impede navigation on this artificially raised waterway. Here again the injury was not compensable.[8]

This same doctrine has been recognized in the decisions of other courts. For example, in *Hood* v. *United States*, 49 C. Cls. 669, 678–680 (1914)[9],

[8] See also *South Carolina* v. *Georgia*, 93 U. S. 4; *Cubbins* v. *Mississippi River Comm'n.*, 241 U. S. 351, 369; *Jackson* v. *United States*, 230 U. S. 1; *Gibson* v. *United States*, 166 U. S. 269.

[9] An examination of the records of the Court of Claims discloses that upon a new trial subsequently granted in this case the same opinion as that appearing at 49 C. Cls. was adopted.

the claimant had constructed a mill over the Monongahela River. The United States, in improving navigation, raised the river's surface above ordinary high-water level, thereby flooding the lower part of the mill as well as some fast land along the shore. The Court of Claims allowed recovery for the submergence of the uplands above the high-water mark but not for the flooding of the mill building located within the river bed. It will be noted that the building in the *Hood* case, like the embankment in the instant case, was not an obstruction to navigation—at least it had not been ordered removed. Yet the owner was not entitled to any compensation for the flooding of the structure to a point well above the natural high-water mark.

Similarly, in *Great Northern Ry. Co.* v. *Washington Elec. Co.,* 197 Wash. 627, 86 P. 2d 208 (1939), the court, although holding a private power company liable for the washing away of a railway embankment constructed partially within the bed of a navigable river, was careful to note that, had the United States constructed the dam which caused the railroad embankment to be washed away, it would not have been liable.

In reaching a contrary conclusion the court below relied upon *United States* v. *Cress,* 243 U. S. 316, and *United States* v. *Lynah,* 188 U. S. 445. The *Cress* case is not in point, and the *Lynah* case

is no longer an authority in this respect and is in any event clearly distinguishable.

The *Cress* case is not in point because it involved land impressed with no navigation servitude, namely, land in the bed of a *non-navigable* tributary and land above high-water mark. Cf. *Marret* v. *United States,* 82 C. Cls. 1, 14 (1936), certiorari denied 299 U. S. 545. If any dicta in that case be construed as indicating that the Government's servitude in a *navigable* river is "confined to the natural condition of the stream," it is overborne by the actual decisions, discussed above, permitting the Federal Government to make artificial improvements without incurring any liability for damages caused to structures or property located on, under, and over the bed of the stream.[10]

The *Lynah* case can no longer be viewed as an authority on the point for which it was cited by the court below.[11] In that case a riparian proprietor,

[10] The "natural condition of the stream" may often be a relevant factor in determining whether a particular tract of land is subject to any servitude at all, but once the servitude is found to exist, such lands and the structures built thereon must "suffer the consequences" of artificial improvements, such as dredging, damming, etc. Cf. *United States* v. *Appalachian Electric Power Co.*, October Term, 1940, pp. 8–9, 20.

[11] The *Lynah* case is admittedly good law, insofar as it stands for the proposition that an actual and authorized taking gives rise to an implied promise on the part of the Government to pay compensation, a promise enforceable in the Court of Claims. It is for this principle that the case has been so frequently cited (Br. in Opp. 26). But it has

by means of an embankment along the Savannah River, had reclaimed lands between high- and low-water mark which he used for the growing of rice. The Government later constructed a dam which kept the river a foot or two above its former level at low tide. This made it impossible to drain the rice lands which in time became permanently flooded. By a five to three decision, this Court held that there had been a compensable "taking."

The majority opinion written by Mr. Justice Brewer seems to have viewed the Government's navigation servitude as nothing more than the power to utilize the bed of the stream by paying compensation therefor, a mere power of eminent domain (pp. 464–465, 471). Such a narrow construction of the Government's paramount rights in the beds of navigable streams has been repudiated by later decisions permitting the Government to appropriate such lands for navigation purposes wthout the payment of compensation. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Jenkins* v. *United States*, 60 C. Cls. 23, 28–29 (1925), affirmed, 273 U. S. 649; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251.

If the *Lynah* case be construed as denying the existence of a servitude in that portion of the

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not once been cited by this Court as a precedent requiring the Government to pay compensation for the "taking" of land impressed with a navigation servitude.

stream between high- and low-water mark, it has been impliedly overruled by the later decisions of this Court recognizing the Government's rights up to the high-water mark. *Willink* v. *United States,* 240 U. S. 572, 580; *Greenleaf Lumber Co.* v. *Garrison,* 230 U. S. 251, 263; *Marret* v. *United States,* 82 C. Cls. 1, 13 (1936), certiorari denied, 299 U. S. 545; *United States* v. *Meyer,* 113 F. 2d 387, 398 (C. C. A. 7), certiorari denied November 25, 1940.

The dubious standing of the *Lynah* case is further emphasized by the fact that a subsequent case involving an adjacent rice plantation on the Savannah River, presenting identical facts, was affirmed only by an equally divided court. *United States* v. *Heyward,* 250 U. S. 633. That case had been twice argued in the Court of Claims and a different Chief Justice on each occasion had expressed his doubts about the correctness of the *Lynah* decision. *Heyward* v. *United States,* 46 C. Cls. 484, 501 (1911), 52 C. Cls. 87, 89 (1917).

Even if the *Lynah* decision is still good law, it is clearly distinguishable from the present case on the same grounds which Mr. Justice Brewer used in distinguishing it from *Mills* v. *United States,* 46 Fed. 738 (S. D. Ga.). Mills, like Lynah, was the owner of a rice plantation along the Savannah River, which had been affected by the Government dam downstream. To prevent his reclaimed lands from being flooded, it was neces-

sary for Mills to raise the levees around his rice fields and to construct a new drainage system at a cost of $10,000. The district court held that there had been no compensable taking. In distinguishing that decision in his opinion in the *Lynah* case Mr. Justice Brewer said (188 U. S. 474):

> Obviously there was no taking [in the *Mills* case] of the plaintiff's lands, but simply an injury which could be remedied at an expense as alleged of $10,000, and the action was one to recover the amount of this consequential injury. *The court rightfully held that it could not be sustained.* Here [in the *Lynah* case] there is no finding, no suggestion, that by any expense the flooding could be averted * * * we must under the findings regard the lands in controversy as irreclaimable and their value wholly and finally destroyed.[12]

It is submitted that the present case falls within the facts of the *Mills* rather than the *Lynah* decision. The railroad embankment is not completely submerged. It is still being used and will continue to be used by the fast trains between Chicago and the Twin Cities (R. 99–107). The respondents, like Mills, were merely put to some expense in order that they might be able to con-

[12] The *Mills* case is also cited with approval in *Manigault v. Springs*, 199 U. S. 473, 484; *Chicago, B. & Q. Railway v. Drainage Comm'rs*, 200 U. S. 561, 584.

tinue using the bed of the stream. Such injuries are consequential in character and do not constitute a taking within the meaning of the Fifth Amendment. *United States* v. *Lynah,* 188 U. S. 445, 473–474; *Manigault* v. *Springs,* 199 U. S. 473, 484–485; *Bedford* v. *United States,* 192 U. S. 217, 224; *Willink* v. *United States,* 240 U. S. 572, 581.

4. *Even a licensed structure in the bed of a navigable river must "suffer the consequences" of subsequent improvements.*—Possessing the plenary power to exclude private structures from navigable rivers, the United States may make the erection or maintenance of such structures in a navigable river dependent upon a license. *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 268; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 707; *United States* v. *Appalachian Electric Power Co.,* No. 12, October Term, 1940, p. 20. This power has been exercised by Congress through the Rivers and Harbors Act of 1899, which makes it unlawful "to construct or commence the construction of any bridge, dam, dike, or causeway over or in any * * * navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plan shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War," or to build any pier or other structure in a navigable river, where no harbor lines have been established, "except on

plans recommended by the Chief of Engineers and authorized by the Secretary of War." Act of March 3, 1899, c. 425, secs. 9 and 10, 30 Stat. 1151.

While it is true that the railroad company, before realigning its roadbed in 1910, obtained the local army engineer's consent (R. 147–151), the company did not submit its plans to the Chief of Engineers and the Secretary of War as required by the Rivers and Harbors Act of 1899. But even if it had, the Government would not be prevented by any principles of contract or estoppel from making subsequent navigation improvements. Power once exercised is not forever exhausted. The fixing of a harbor line or the issuance of a license to construct a bridge or causeway does not foreclose all subsequent changes. Inconveniences thus caused are *damnum absque injuria*. *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 260; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 638; *Louisville Bridge Co.* v. *United States*, 242 U. S. 409, 420–421. For example, in the *Greenleaf* case the new harbor line cut off 200 feet of the plaintiff's wharf which had been built within the lines originally established by the Secretary of War. But since the wharf rested on land subject to a navigation servitude, the claimant was not entitled to compensation. Compare *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 615, 638; see also *Union Bridge Co.* v. *United States*, 204 U. S. 364, 373, 388–389, 399–400.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed with directions to the district court (1) to dismiss from the condemnation proceedings that segment of the railroad embankment which is concededly within the bed of the Mississippi River (R. 123), and (2) to determine whether the other three segments are located on land impressed with a navigation servitude.

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JANUARY 1941.

APPENDIX A

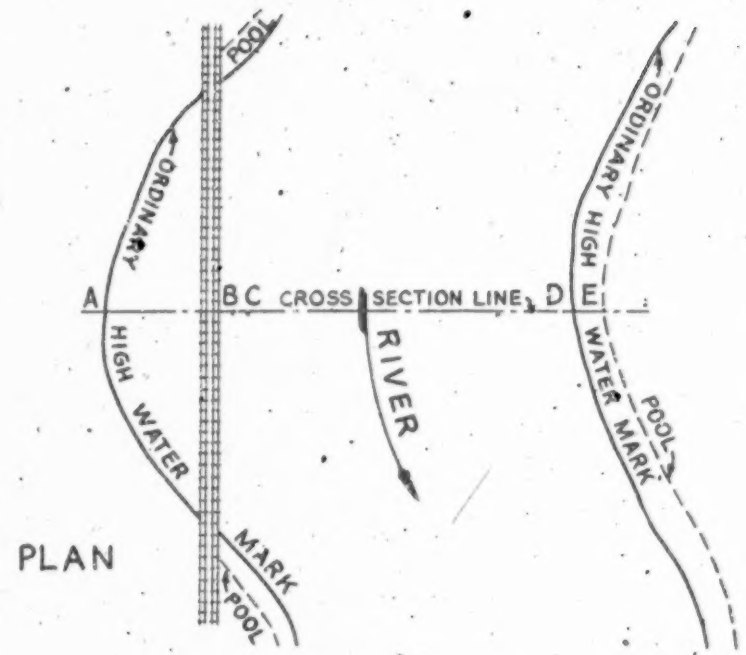
Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, (33 U. S. C., secs. 401, 403):

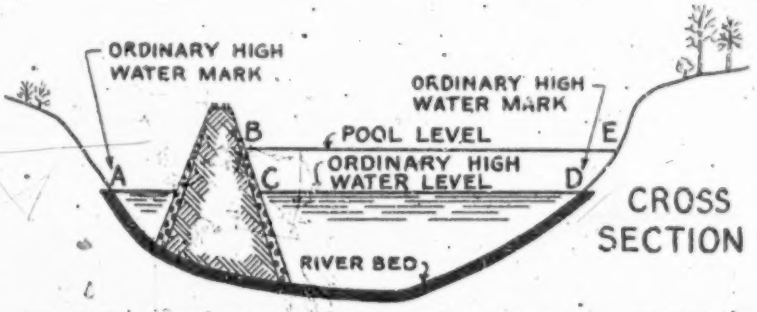
SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 10. That the creation of any obstruction not affirmatively authorized by Con-

gress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

APPENDIX B





The above plan and cross-section are sketches of a typical "encroachment area." They illustrate, in simplified form, the legal issue and are not intended to represent an accurate picture of the "encroachment areas" in issue here. The Government concedes its liability to pay compensation for flowage of property situated outside of the river bed, as for example between D and E. But it denies liability to pay compensation for the flowage of property within the river bed caused by raising the water surface vertically above ordinary high-water level, as from C to B.

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